

IN THE SENATE OF THE UNITED STATES.

MARCH 8, 1860.—Ordered to be printed.

Mr. MALLORY submitted the following

REPORT.

The Committee on Claims, to whom was referred the petition of the legal representatives of John G. Mackall, have had the same under consideration, and thereupon report :

The petitioners claim from the United States payment for a dwelling house and its appurtenant out-buildings, which belonged to John G. Mackall, in Calvert county, Maryland, and which the British forces destroyed in 1814 ; and they allege that it was burned in consequence of its "occupation by the American forces." This claim has been urged during the last forty-four years, either before the executive officers of the government or before Congress. It seems to have been one of the first cases presented under the act of April 9, 1816. [Stat. at Large, vol. 3, p. 261.]

The following is the letter of the Third Auditor to the committee of the House of Representatives of 1846, together with the statement and summary of the facts involved in the case, made by the Commissioner, Richard Bland Lee :

TREASURY DEPARTMENT, THIRD AUDITOR'S OFFICE,
February 6, 1846.

SIR : I have had the honor to receive your letter of the 3d instant, inclosing the petition and papers of James J. Mackall and others, heirs and representatives of Captain John G. Mackall, deceased, in which you say, "The Committee of Claims desire to know whether any information exists in your (this) office, and if so, that it be communicated, calculated to throw any light upon the merits of this claim." In reply, I have the honor to state that, on referring to the records and files of the office, it is found that a claim in the name of John G. Mackall, for the loss of a dwelling and other houses and property, said to have been destroyed by the British, in the year 1814, had been presented for payment or adjudication by the late Commissioner on Claims, Richard B. Lee, Esq., and that commissioners had been by him appointed in October, 1816, to take testimony in the case, who made

their return early in December following, upon which Commissioner Lee made a statement of the evidence obtained, and a summary of the facts, and transmitted the papers to Congress on the 10th of December, 1817. These papers were subsequently, at my request, transferred from the files of that body to this office. It appears from the indorsements on the envelope of the papers, that they were referred on the 10th December, 1817, to the Committee on Claims; on the 17th of the same month, "report made, concurred in, and petition rejected;" December 18, 1857, subject reconsidered and committed to Committee Whole House on the report in the case of John J. Pattison; January 23, 1818, ordered to lie upon the table. I inclose herewith a copy of the statement of the evidence and summary of facts referred to above, which is all the information the records of this office have been found to afford on the subject. I have the honor to return the petition and papers.

Most respectfully, your obedient servant,

PETER HAGNER,
Auditor.

Hon. JOHN A. ROCKWELL,
House of Representatives.

CASE OF CAPTAIN JOHN G. MACKALL.

OFFICE OF CLAIMS, &c.,
Washington, December 10, 1817.

Captain John G. Mackall claims payment for a frame dwelling-house, kitchen, out-houses, furniture, and grain destroyed by the enemy near the Patuxent river, in Calvert county, Maryland, in consequence, as he alleges, of the dwelling-house having been in the military occupation of the United States, and he estimates the value of his property so destroyed, as follows:

Dwelling-house.....	\$6,000
Kitchen and out-houses.....	1,000
Furniture.....	600
Grain.....	200
Total.....	<u>\$7,800</u>

Statement of the evidence.

It appears by the depositions of Major Walker and Captain McWilliams, that on the 11th of June, 1814, they, with others, accompanied Lieutenant Neale of the United States army, (since deceased,) with dispatches to Commodore Barney, then blockaded by the enemy in St. Leonard's creek; that they crossed the Patuxent river and went to the claimant's house, where they procured horses, and then proceeded to the commodore; that on their way back they saw the claimant (who stated that he was from home on duty) and obtained his consent to their stopping at his houses and refreshing themselves; that finding on their reaching it, on account of the absence of some of their company, they could not recross the river that night, they lodged in said

house; that on the following morning, when crossing the river, the the British barges were in sight and were making for the shore which they had just left, and fired at it several guns, and that Lieutenant Neale was dressed in uniform and wore his sword.

It appears by the depositions of Captain Gray and James Denton, a sergeant in the company he commanded, that on the 15th of June, 1814, the enemy ascended the Patuxent river in a schooner and fourteen or fifteen barges; that a part of the company, about sixty in number, was stationed within one hundred and fifty yards of the claimant's house for its protection; and Captain Gray and Sergeant Denton went to the house and found there a person by the name of Crane (now dead) who resided with the claimant in the capacity of a schoolmaster, and having informed him of the right of their visit, he objected to any opposition being made to the enemy, as they were too many in number for the captain's command, and required him and Sergeant Denton to leave the house, which after some persuasion they did, and retreated with said company; and that when they were at the claimant's house they were in full view of the enemy.

It appears by the deposition of George Posey, a member of Captain Gray's company, (after a statement of the fact of the company's having halted within one hundred and fifty yards of the claimant's house,) that on their retreat they were fired at by the enemy's troops.

It appears by the deposition of Edward Truman, that a few days after the burning of the claimant's houses, he saw Mr. Crane, who stated that he had been requested by the claimant to stay at his house and endeavor to protect it. That the British officer who first entered the house told him (Crane) it should not be burnt, but he was ordered to the river as a prisoner of war, and when he arrived there, an officer said to him he had seen some militia about the house, and it should be burnt, and then in his presence ordered a man to go and set fire to it.

It appears further by Sergeant Denton's deposition, that Crane told him that he (Crane) heard some British officers say the claimant's house was burnt in consequence of their seeing the militia at it.

It appears by the deposition of James Jones, that in August, 1814, he had a conversation with a British officer, respecting the burning the claimant's houses, in the course of which the officer said they were burnt in consequence of one of the British marines having been wounded near them, and that no other houses were burnt at the same time and on the same shore except Captain John Browne's.

It appears by the deposition of Dr. John Dare, that he was well acquainted with the claimant's buildings, and that they were worth, as he believes, the following sums, viz:

Dwelling-house.....	\$4,500
Out-house.....	500
	<hr/>
	5,000
And the materials remaining after destruction.....	50
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	4,950
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And it appears by the deposition of the claimant, that he has received no compensation from any officer, or agent, or department of the government of the United States, for the destruction of his houses, and that he did not agree with any officer or agent of the government to run any risk on account of the use of the same in the public service, and that the testimony he has produced is the best he could obtain.

Summary of facts.

It appears that the claimant's house was occupied on the evening of the 11th of June, 1814, as quarters for a party under Lieutenant Neale, now deceased. That the next day, when crossing the river Patuxent from the house, this party was in view of the enemy, who fired upon the shore from their barges. Lieutenant Neale was in uniform.

It appears that a party of militia, on the 15th of June, 1814, the day of its destruction, took a position about one hundred and fifty yards from the house for the purpose of defending it; that the commanding officer, and another officer, went to the house and were seen there by the enemy; that the commander was persuaded by a person in custody of the house to leave it and make no resistance from the superior numbers of the enemy. It is also proved that the enemy declared that they burnt the claimant's houses, because they saw the militia at them, and because one of their marines had been wounded near them. It does not appear that any of the houses of the claimant except the dwelling-house, was ever occupied as barracks, and none as military deposits, and that the dwelling-house, on the day of its destruction was not so occupied, unless Congress shall deem it equitable to regard the appearance of the commander of the corps, stationed on the land for its defense on that day with one of his officers at the house in sight of the enemy, as such occupation. It is proved that the enemy made these circumstances a pretext for destroying the houses of the claimant. But if Congress shall be of opinion that the occupation of the dwelling-house of the claimant was such as to require indemnification, and shall confine themselves to the construction of the President of the law of 9th April, 1816, as stated in the case of Mrs. George Thompson's executor: "That consequential damage is not provided for;" his claim of redress must be limited to the actual value of said dwelling-house at the time of destruction, amounting, after deducting the value of the materials remaining, to the sum of \$4,450. The estimate made by the claimant of all the damage sustained by him, amounts to \$7,800.

All which is respectfully submitted,

RICHARD BLAND LEE, C. C.

Before referring to the proof submitted in support of the memorial, your committee deem it proper to advert to the principles of public law which the claim involves; to the Congressional and departmental action

heretofore had in such cases; and particularly to the case of — Catlett, claiming indemnity for tobacco destroyed at the same time in "*Magruder's warehouse*."

Upon the termination of the war of 1812, Congress, to provide for the payment of private property taken for the public use, or destroyed by the enemy because of its use and occupation by the United States, passed the act of April 9, 1816.—(See Statutes at large, vol. —, p. —.)

Section 9 provided "that any person who, in the time aforesaid, has sustained damage by the destruction of his or her house or building by the enemy, while the same was occupied as a military deposit, under the authority of an officer or agent of the United States, shall be allowed and paid the amount of such damage: *Provided*, it shall appear that such occupation was the cause of its destruction."

Section 15 provided "that no claim authorized by this act shall be allowed or paid unless the same shall be exhibited within two years from the passing hereof."

The commissioner appointed to determine the claims to be presented under this act at once entered upon his duties, and the President of the United States, through the Secretary of War, instructed him as to the construction of the ninth section, above cited, as follows:—(See State Papers, vol. Claims, pp. 491, 691.)

"The ninth section of the act extends only to cases of destruction of property by the enemy which are justifiable by the laws of civilized warfare. The occupation of houses or buildings as places of military deposit, or by an armed force, must be continued up to the time of the destruction.

"That the occupation of houses or buildings by an armed force for a night, upon a march, is not within the meaning of the said section, unless within the immediate presence of the enemy.

"That no compensation, by way of interest, rent, or damage, can be allowed under the act for the time which elapses between the destruction of the property and the decision of the commissioner.

"That the act does not extend to the case of consequential injury, resulting from the destruction of houses or buildings under the ninth section.

"No compensation can therefore be allowed for the destruction of houses or buildings not occupied as a military deposit or by military force."

The commissioner had entered upon his duties about the first of June, 1816; the President's instructions are dated 21st October, 1816, and, on the 1st of November following, he directed the commissioner to suspend all decisions under this ninth section until further advised; and, on the 6th of December, 1816, the President sent to Congress the following special message:

"To the Senate and House of Representatives of the United States:

"The ninth section of the act passed at the last session of Congress 'to authorize the payment for property lost, captured, or destroyed by the enemy, while in the military service of the United States, and for other purposes,' having received a construction giving it a scope of

great and uncertain extent, I thought it proper that proceedings relative to claims under that part of the act should be suspended until Congress should have an opportunity of defining more precisely the cases contemplated by them. With that view, I now recommend the subject to their consideration. They will have an opportunity, at the same time, of considering how far the provisions of the act may be rendered more clear and precise in their import.

“JAMES MADISON.”

(See State Papers, vol. Claims, p. 484.)

This message was referred to the House Committee on Claims, who reported (17th December, 1816,) “that the committee were decidedly of the opinion that the commissioner, appointed to carry the act into effect, had given and was still disposed to give to the law an extension of construction not contemplated by Congress at the time of its passage, and not warranted by its object.” They notice cases of unwarranted adjudications, and lay down the rule that “a mere temporary occupation of the house for one night and a part of the next day by one or two companies of militia, cannot impart to the house even the character of barracks, but much less that of a military deposit.”

These proceedings resulted in the passage of the act of 1817, the first section of which provided “that the ninth section of the act entitled ‘An act authorizing the payment for property lost, captured, or destroyed by the enemy while in the military service of the United States, and for other purposes,’ passed on the 9th of April, 1816, shall be construed to extend only to houses or other buildings occupied by an order of an officer or agent of the United States, as a place of deposit for military or naval stores, or as barracks for the military forces of the United States.”

The expediency of continuing in force these two acts of 1816–17 was submitted to the House Committee on Claims, who reported against it, principally on the ground that frauds had been committed under them; and they were allowed to expire on the 18th April, 1818, the undetermined cases under them being referred to the Third Auditor.—(See State Papers, vol. Claims, p. 590.)

By the *act of 3d March, 1825*, claimants who had presented their claims under the provisions of the acts of 1816–17, but who had failed to obtain final action thereon, were authorized to present them to the Third Auditor, who was authorized to adjudicate and certify them for payment, *under the provisions of said acts*.

Your committee have made special reference to these acts, not only because those of 1816–17 were passed while the evils they were designed to relieve were fresh in the memory of Congress, but because they contain all the relief which Congress deemed it just to afford.

Throughout the fourteenth and fifteenth Congresses numerous applications were made for indemnity for property destroyed by the enemy, and the general views of Congress upon all such cases were frequently and unequivocally expressed.

Until 1821 the Committee on Claims of the House of Representatives had regarded the military occupation of houses, *up to the time of their destruction by the enemy*, as bringing them within the provisions

of the act of 1816; but in that year, upon a full discussion of the principles involved, the House decided that the occupation of a house as barracks, even up to the time of its destruction, did not justify its destruction by the rules of civilized warfare, and therefore did not come within the law, except in cases where the destruction had been found necessary to dislodge the enemy.

This was found to have been in accordance with the usage during the late wars in Europe.

Not even public barracks were deemed legitimate objects of destruction after being evacuated.—(State Papers, vol. Claims, pp. 815, 816.)

Congress intended to provide payment for such losses only as were known to have happened according to the rules of civilized warfare, and for no others.—(State Papers, vol. Claims, p. 796.)

As one party would not have a right to put a prisoner to death on the ground that he had fought, or that when exchanged he might fight again, so he would not have the right to destroy private property either because it had been used or might again be used in the progress of the war.—(State Papers, vol. Claims, p. 796.)

From Reports of Committees of the Fourteenth Congress.

The course heretofore pursued by Congress inculcates that indemnity is due to all those whose losses have arisen from the acts of our own government, or those acting under its authority; while losses produced by the conduct of the enemy are to be classed under the unavoidable calamities of war, and do not entitle the sufferers to indemnification from government.—(State Papers, vol. Claims, p. 442.)

From Reports of Senate Committees.

The utmost extent to which Congress can safely go is to protect individuals against its own acts and their consequences. If a house be occupied by the troops of the country for military operations, it is thereby placed on a footing of any other military position, and may be justifiably destroyed by the enemy.—(23d Cong., 1st sess., Rep. No. 355.)

Where a building is occupied by our troops, who are dislodged by the enemy, and the latter take possession of it, and after occupying it for a time, on evacuating, destroy it, it comes within the principles established in similar cases.—(26th Cong., 1st sess., R. 146.)

The above opinion is reversed. The principles recognized in the general legislation of Congress for the adjustment of war claims, and the regulations for carrying those laws into effect, should be adhered to.—(26th Cong., 1st sess., No. 350.)

The liability of the government in such cases was ably discussed by Mr. Silas Wright, on the presentation of the petition of —.—(See 27th Cong., 2d sess., Rep. 272.)

He says, "the rules of action in the decisions of these claims should be the general legislation and the allowances under it; to act otherwise would be to unsettle every case of a claim which has been heretofore settled under these laws, and, by taking the most liberal and latitudi-

nous private law which has been passed as the settled rule and established precedent, invite all those whose claims have been rejected, or in whose favor partial awards have been made, to come again to Congress for a further allowance."

The principles established in the general legislation of the country, and to which the committee have determined to adhere in reference to these "war claims," are the following:

1st. The building must have been in the actual occupancy of the United States.

2d. It must have been so occupied "as a place of deposit for military or naval stores," "or as barracks for the military forces of the United States."

3d. The occupancy must have been by an order of an officer or agent of the United States.

4th. The occupancy must have continued to the time of the destruction.

5th. Such occupation must have been the cause of the destruction.

Each and every of these facts must be fully sustained, in order to bring any case within the rule, the absence of any one of them being decisive against it.

These principles cannot be safely extended as general principles, applicable to a state of war. The great mass of the claims of this character, arising during the war of 1812, have been settled, and finally disposed of under these laws, and upon these principles; and now to extend the rules of allowance to those who have neglected to avail themselves of the general legislation, and choose to rest upon the sympathy of Congress and special favor, would be most manifestly unjust. Great and salutary principles of general legislation for the settlement of classes of claims, are not to be varied or construed by occasional acts of a private character, in which a strict adherence to them may have been relaxed.

It was before the Senate—

2d session 25th Congress. Committee on Claims. Adverse report, and agreed to by the Senate.

3d session 25th Congress. Committee discharged.

1st session 26th Congress. Adverse report, and agreed to.

1st session 30th Congress. Bill reported.

1st session 31st Congress. No action.

1st session 32d Congress. Bill reported.

1st session 33d Congress. Bill passed.

It was before the House—

1st session 15th Congress. Committee on Claims. Adverse report, and agreed to.

2d session 23d Congress. Adverse report. Laid on the table.

1st session 24th Congress. Adverse report. Laid on the table.

2d session 24th Congress. Adverse report. Laid on the table.

2d session 27th Congress. No action.

3d session 27th Congress. No action.

1st session 28th Congress. No action.

2d session 28th Congress. No action.

1st session 29th Congress. Committee discharged. Laid on the table.

This committee beg leave to refer to their report, No. 175, 1st session 35th Congress, for their views upon this and similar claims. They report that, in their judgment, on a careful review of the facts in the case, and of the principles of public law applicable to them, the prayer of the petitioner ought not to be granted; and they recommend the adoption of the following resolution:

Resolved, That the prayer of the petitioner be rejected.

Rep. No. 118—2

